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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES,

Plaintiff,

v.

JUAN VAZQUEZ GONZALEZ,

Defendant.

No. 17-CR-209-SMJ

RESPONSE TO
GOVERNMENT'S
SENTENCING
MEMORANDUM

I. SENTENCE COMPARISONS

The danger with sentence comparisons in these types of cases, is that far too often it is the prosecutor, not the §3553(a) factors, that drives the sentence. Various statutes contain the same offense behavior, some of which carry mandatory minimums, some of which do not. So one must ask, is the sentence the product of a mandatory minimum? Or, is the prosecutor controlling the terms of an 11(c)(1)(C) plea in return for a non-mandatory minimum charge? Is the prosecutor agreeing to drop the mandatory minimum charge in return for agreed upon, albeit questionable Guideline enhancements? Or, is the sentence truly the product of weighing the Guidelines with the §3553(a) factors? In all cases where a mandatory minimum statute is charged, the Government has the power to manipulate charges and plea agreements to dissipate the power of the §3553(a) factors.

The Government has presented a chart and compared four other cases to argue a 120-month sentence is consistent with Mr. Vazquez's offense conduct and necessary to avoid unwarranted sentencing disparity. In this statement, the Government fails to address the charge and plea agreement manipulations.

The Government states "[b]ut in this District, Defendants who engage in the same or similar conduct as Defendant Vazquez-Gonzalez – arranging and then showing up to engage in a commercial sexual act with a child – routinely receive

sentences of 120- months and higher.” This argument fails on several grounds. In some of the cases, the judges had no choice but to sentence the mandatory minimum. Thus it was not the conduct, but the mandatory minimum that drove the sentence. In other cases, the defendant had to agree to a specific Guideline range in order to have the mandatory minimum charge dropped. Thus, again, it was not the offense conduct, but rather the dropped mandatory minimum and Government-driven 11(c)(1)(C) agreement that drove the sentence. And, in other cases, the defendants had committed far more egregious behavior and it was that additional behavior that drove the sentence. Thus, the Government’s argument is flawed.

A. The Government’s chart and four other cases

The Government presents a chart and compares four other individual cases to Mr. Vazquez. There is no comparison. There is only contrast.

Defendant	Case	Conviction	Custodial Sentence	Supervised Release
Jerry Lindsey, Jr.	16-06023-RMP	Attempted Enticement of a Minor	120 months	5 years
Thomas Lafontaine	15-06017-EFS	Attempted Enticement of a Minor	120 months	25 years
John Heath	15-06013-EFS	Transfer of Obscene Materials (Attempted Enticement of a Minor dismissed as part of plea)	96 months	3 years
Felix Diaz	15-06004-SMJ	Attempted Enticement of a Minor	84 months (after 5K)	10 years
Timothy Shelly	09-00089-RHW	Coercion of a Minor / Travel with Sexual Intent	144 months	lifetime

1 **1. Defendants sentence based on a mandatory minimum**

2 **a. *United States v. Lindsey***

3 He did receive a 120-month sentence. Jerry Lindsey proceeded to trial and
 4 was found guilty by a jury. Judge Peterson was constrained by a mandatory
 5 minimum 120-month term of imprisonment. The sentence was not based on the
 6 conduct, but rather because the prosecutor chose to proceed on a charge with a
 7 mandatory minimum sentence. It was the prosecutor, not the §3553(a) factors that
 8 drove the sentence. In imposing sentence, Judge Peterson put on the record she
 9 thought the sentence was too long.

10 Regarding the need to avoid unwarranted sentencing
 11 disparities, there again, because Congress has imposed such a
 12 strict mandatory minimum, they are dictating this, regardless of
 13 the case. Once the Government decides to choose to charge this
 14 crime, everything else is out of the Court's hands.

15 So, finally, I am supposed to impose a sentence that is
 16 sufficient but no greater than necessary. I find that a
 17 120-month sentence is greater, but I have no legal ability to
 18 sentence below there, so I will sentence you to the 120 months
 19 of custody; five years of supervised release with the standard

16-cr-06023-RMP,
ECF 132, at 27

16 **b. *United States v. Rosier***

17 He too was sentenced to 120 months. Like Judge Peterson in *Lindsey*, Judge
 18 Shea in *Rosier* was constrained by a ten-year mandatory minimum sentence. That
 19 prosecutor tied the court's hands from considering the §3553(a) factors for a below

1 Guideline/mandatory minimum sentence. The sentence was driven by the
2 mandatory minimum, not the offense conduct.

3 **2. Defendants with prior or pending child sex offenses**

4 **a. *United States v. Lafontaine***

5 Mr. Lafontaine received a 120-month sentence. He has two prior convictions
6 for first degree rape and first degree child molestation. And, during the offense of
7 conviction, he also was found communicating in a sexually explicit manner with at
8 least three other juveniles.

9 The circumstances of the offense involve Defendant's attempting to entice a
10 minor and meet with her for sex. Defendant engaged in sexual misconduct against
11 children previously and was involved in similar misconduct with other children at
12 the time of the instant offense.

13 Defendant maintains a prior juvenile convictions for First Degree Rape of a
14 Child and First Degree Child Molestation. ECF No. 37 at ¶¶ 64-75. The offenses
15 involved touching the genitalia of one minor (age 7) under the clothing and vaginal
16 sexual intercourse with the other minor (age 9).

17 At or near the time of the instant offense, Defendant was communicating on
18 Facebook, using a fictitious profile of a 17 year old named Dirk Digger. ECF No.
19 37 at ¶ 34. He used the profile to communicate with his 15 year old step daughter's
friend. ECF No. 37 at ¶ 34. The friend was 14 years old. ECF No. 37 at ¶ 34.

15-cr-06017-
EFS,
Gov't
Sentencing
Memo, ECF
39, at 5.

17 Defendant also communicated with a 12 year old over Facebook, sending
18 her a photo of an erect penis and asking her questions about her vagina. ECF No.
19 37 at ¶ 40. He explained how he would perform oral sex on the child, to which she
responded, "I'm only 12." ECF No. 37 at ¶ 40. Defendant responded that the

b. *United States v. Heath*

Mr. Heath received a sentence of 96 months. Not only does he have prior convictions for third degree rape of a child and third degree child molestation, as part of his offense behavior on his federal charge, he asked the juvenile female to take a photograph of her naked genitalia and he sent her a photo of his naked penis.

The communications continued until April 2, 2015, and revealed the Defendant's grooming behavior and his intent to have sexual contact with UC in Richland, Washington. During that time, the Defendant requested the UC take nude photos of her vagina. On March 1, 2015, the Defendant emailed the UC a video that showed the penis of an adult male. The Defendant emailed the UC a similar video the next day.

See, 15-cr-06013, Gov't Sentencing Memorandum, ECF 41, at 5

c. *United States v. Diaz*

Mr. Diaz received a sentence of 84 months. During the offense of conviction, Franklin County was investigating Mr. Diaz for a hands-on sex offense with his juvenile foster child. The parties negotiated a global resolution.

13. State Prosecution

At the time of the instant investigation, Defendant was also being investigated by Franklin County for alleged sexual misconduct with T.M., a foster child who was in Defendant's care. Franklin County has agreed not to pursue a prosecution for that misconduct if this plea agreement recommending 84 months imprisonment is accepted.

15-cr-060004-SMJ, plea agreement, ECF 39, at 13

d. *United States v. Holden*

Mr. Holden received a 240-month sentence. This was a downward variance from his life Guideline. As part of a global resolution with Benton and Spokane Counties, Mr. Holden agreed to plead guilty to attempted enticement of a minor; two counts of production of child pornography with two different victims; one count of attempted production of child pornography with a third victim. The global resolution contemplated his plea to two counts of attempted rape of a child in Benton County.

e. *United States v. Allison*

Mr. Allison received a 135-month sentence. During a polygraph examination, Mr. Allison admitted to a number of hands-on offenses.

In a subsequent polygraph examination, Defendant admitted to a number of contact offenses and other child exploitation conduct. (ECF No. 39, ¶¶ 43-51.) Defendant again admitted that he had a sexual interest in children, and had for some time; in particular, Defendant acknowledged that he was sexually attracted to his 10-year-old stepdaughter. (*Id.*) While Defendant was discussing his sexual attraction to her small breasts, detectives observed Defendant fondling and pinching his own nipples, seemingly oblivious to the fact that he was doing so. (*Id.*) Defendant admitted that he

17-cr-06044-SMJ, United States' Sentencing Memorandum, ECF 40, at 2

1 **3. Defendants who either sent naked pictures of themselves or**
 2 **had the victims send naked pictures of themselves**

3 **a. *United States v. Guthmiller***

4 Guthmiller, like Heath, requested the victim send him a naked picture, an
 5 offense which carries a mandatory minimum fifteen years imprisonment.

6 On August 3, 2016, Defendant also attempted to convince “Steph” to engage in
 7 sexually explicit conduct for the purpose of producing a visual depiction of that conduct
 8 and sending it to him: “Get a camera phone already i want a dirty pic ;)”. When “Steph”
 9 asked, “Of what”, Defendant answered, “Id be happy with anything dirty lol”. Steph
 10 emailed, “Well what” and Defendant told her, “Pussy, ass or boobs”. Defendant also

17-cr-06034, Plea
 Agreement, ECF
 32, at 6

9 Guthmiller’s sentence is also the product of tied hands. He was originally
 10 indicted on a charge carrying a ten-year mandatory sentence under §2422(b)
 11 attempted enticement of a minor. The prosecutor had Guthmiller between a rock
 12 and a hard place – he had to agree to an 11(c)(1)(C) range before the prosecutor
 13 would drop the mandatory minimum and file an Information Superseding
 14 Indictment. *See*, ECF 31. In other words, the prosecutor drove the sentence, not
 15 the §3553(a) factors.

16 **b. *United States v. Timothy Shelly***

17 Mr. Shelly received a 144-month sentence. He met a juvenile in a chat room.
 18 They began extensive dialogue. Shelly then flew from Michigan to Eastern
 19 Washington to have sex with the juvenile. He met with the child and actually had

1 sex with her. When the offense was uncovered, law enforcement searched Shelly's
 2 computer and found thousands of images of the victim. Seven hundred images
 3 showed her exposed vagina.

4 A forensic analysis was performed by the FBI Seattle CART on the
 Defendant's computer and the two computers obtained from the victims residence.
 5 The forensic analysis revealed numerous e-mails and chat sessions between
 Timothy Shelly and the minor victim on the computer hard drives. The first chat
 6 recovered is dated April 16, 2005 and the last chat recovered was on September 7,
 2005. The forensic analysis also revealed thousands of images of the victim on
 7 the Defendant's computer. The minor was naked in many of these images and her
 vaginal area was exposed in over 700 of these images. Some of these images
 8 depicted the minor inserting an object inside her vagina. Over 700 images of the
 9 minor are child pornography as defined by federal law.

09-00089-RHW,
 Gov't memo in
 opposition to
 defendant's appeal
 of magistrate's
 order of detention,
 ECF 37, at 7

10 This additional information is what drove the sentences. None of the
 11 aggravating factors exist in Mr. Vazquez's case. He has no prior convictions, let
 12 alone prior convictions or pending charges against children (Lafontaine, Heath,
 13 Holden, Allison); he did not ask for a naked picture (Guthmiller, Heath, Holden),
 14 let alone 700 hundred nude photos (Shelly); he refused to send a picture of his penis
 15 to a juvenile female (Heath); he did not have a concurrent state investigation
 16 involving the sexual molestation of a foster daughter (Diaz). And here, unlike
 17 *Lindsey* and *Rosier*, the Government has given the Court full power to consider all of
 18 the §3553(a) by allowing Mr. Vazquez to plead to a non-mandatory minimum
 19 charge. There is no comparison, only contrast.

1
2 Contrast the above cases to those in Idaho. In these Craigslist type sting
3 cases, the Government consistently charges under non-mandatory minimum
4 statutes. The Defendants are not forced into an 11(c)(1)(C) range or agree to
5 manufactured Guideline enhancements and the judges are free to consider all of the
6 §3553(a) factors to determine the appropriate sentence. Idaho judges consistently
7 impose sentences well below ten years. *See, United States v. Magana*, 18-cr-00132-
8 DCN (D. Id, 2018) 60 months; *United States v. Luna*, 18-cr-00133-BLW (D. Id,
9 2018) 60 months; *United States v. Baker*, 18-cr-00129-BLW (D. Id, 2018) 60
10 months; *United States v. Jason Kitley*, 18-cr-00130-BLW (D. Id, 2018) 60 months;
11 *United States v. Van Orsow*, 17-cr-00246-DCN (D. Id, 2017) 37 months.

12 There is sentencing disparity alright – disparity in how cases are handled. But
13 here, this Court has full power to consider all of the §3553(a) factors.

14 **B. The Government is punishing Mr. Vazquez for not accepting an**
15 **11(c)(1)(C) agreement of 87 months**

16 In its sentencing memorandum, the Government informs the Court: “[t]he
17 United States has maintained its position throughout this case that an appropriate
18 sentence for Defendant is between the 10-year mandatory minimum sentence
19 applicable to the attempted online enticement conduct in which he engaged, and the

1 15-year mandatory minimum sentence applicable to the attempted child sex
2 trafficking conduct in which he also engaged.” (ECF 92, at 2) Not true. In an email
3 to counsel dated May 24, 2018, at 11:39 a.m., the Government wrote:

4 against this backdrop, I continue to believe that an 87-month sentence is fair and appropriate for Mr. Vazquez,
5 particularly when it is evaluated against the 10 and 15 year mandatory minimum exposures he faces. I suppose I could
6 have offered a plea at the 120 month mandatory minimum and let you argue me down to 87 months to get to this same
place, but I prefer to just make an offer at the actual number that I think is appropriate. I know you’ll need to talk to him
about this email, and I want to give you a few days to do that. My expert disclosures are due on June 4, and I’ll need a

7 Why the change from 87 to 120? It is not the offense conduct. This is the
8 penalty for rejecting the 11(c)(1)(C) offer.

9 II. CONCLUSION

10 The danger with sentence comparisons is that far too often it is the
11 prosecutor, not the §3553(a) factors, that drives the sentence. This Court has the
12 power to think beyond the mandatory minimums, and balance the Guidelines with
13 the §3553(a) factors. This Court’s hands are not tied and can impose a sentence
14 sufficient, but not greater than necessary to meet those factors within §3553(a).

1 Dated: August 27, 2019 Respectfully submitted,

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7 SERVICE CERTIFICATE

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9
10 I certify that on August 27, 2019, I electronically filed the foregoing with the
11 Clerk of the Court using the CM/ECF System, which will notify Assistant United
12 States Attorneys: David Herzog.

13 *s/Andrea K. George*

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